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CONTRACTS IN EARLY ENGLISH LAW.

THE law of contract holds anything but a conspicuous place among the institutions of English law before the Norman Conquest. In fact, it is rudimentary. Certain provisions which may seem at first sight to show considerable development in this direction turn out, on closer scrutiny, to have a wholly different bearing. There are many ordinances requiring men who traffic in cattle to make their purchases openly and before good witnesses. But they really have nothing to do with enforcing the contract of sale as between the parties. Their purpose is to protect an honest buyer against possible claims by some third person alleging that the beasts were stolen from him. If the Anglo-Saxon "teám" was an ancestor of the Post-Norman law of warranty in one line, and of rules of proof, ultimately to be hardened into rules of the law of contract, in another, the results were undersigned and indirect. Anglo-Saxon society barely knew what credit was, and had not occasion for much regulation of contracts. We find the same state of things throughout northern and western Europe. Ideas assumed as fundamental by this branch of law in modern times, and so familiar to modern lawyers and men of business as apparently to need no explanation, had perished in the general breaking up of the Roman system, and had to be painfully reconstructed in the Middle Ages. Further, it is not free from doubt (though we have no need to dwell upon it here) how far the Romans themselves had attained to truly general conceptions. In any case, our

Germanic ancestors, not only of the Carolingian period, but down to a much later time, had no general notion whatever of promise or agreement as a source of civil obligation. Early Germanic law recognized, if we speak in Roman terms, only Formal and Real Contracts. It had not gone so far as to admit a Consensual Contract in any case. Sale, for example, was a Real, not a Consensual transaction. All recent inquirers, I believe, concur in accepting this much as having been conclusively established by Sohm.

The process of arriving at a law of simple contracts was different in England and on the Continent, although some curious partial coincidences may be found. Both here and on the mainland the secular courts were put on their mettle, so to speak, by the competition of the spiritual power. The canonists, possibly taking up some popular survival of the Roman tradition (a very ancient one), expressed in the cult of Fides and the consecration of the right hand in the office of plighting troth,[1] proclaimed that "fidei laesio," "fidem fallere," was a mortal sin, — a sin to be visited, on due proof, with censure and excommunication. Between breach of oath and breach of plighted word it was only a difference of degree, — "inter simplicem loquelam et iuramentum non facit Deus differentiam." In Italy, where the tradition of classical Roman law never became quite extinct, the development of this doctrine was to some extent checked by the difficulty of stating it in a Roman form of plausible appearance even for the use of ecclesiastical judges;[2] while, on the other side, the problem for the civilian lawyer was to find means of expanding or evading the classical Roman rules, and open the door of the secular tribunal to formless agreements by practically abolishing the Roman conception of "nudum pactum." In England the Court Christian was early in occupation of the ground, and bold in magnifying its jurisdiction. The king's judges were rather slow to discover how great and profitable a field their rival was occupying. The problem was not faced until the common-law system of pleading was mature; and

[1] This is not the place for a digression on Roman legal antiquities. *Fides* is the special name of *iustitia* as applied *creditis in rebus*, Cic. Orat. Part. c. 22, § 78, cf. D. 12. 1. de r. c. 1. [Populus Romanus] omnium maxime et praecipue Fidem coluit, Gell. 20, 1. See Muirhead, Private Law of Rome, 149, 163; Dion. H. 2. 75; Livy, 1. 21, § 4; and (as to the right hand) Plin. H. N. xi. 45, 103, Servius on Aen. 3. 607; E. Pacchioni, Actio ex sponsu (repr. from *Archivio Giuridico*), Bologna, 1888, on the distinct history of the Stipulation.

[2] Seuffert, Zur Gesch. der obl. Verträge, Nördlingen, 1881 (*q. v.* for the whole history), p. 66.

the thing sought was then to invent a new cause and form of action within limits that were no longer wide.

In Italy we find some jurists holding that an action *de dolo* will lie for damage caused by breach of an informal pact.[1] This offers a striking parallel to the influence of the action of deceit in forming the English doctrine of assumpsit, which is now put beyond question by the researches of Judge Hare and Mr. Ames. But the method which found most favor among the Italians was to hold that an additional express promise ("pactum geminatum" or "duplex") was a sufficient "clothing" of the natural obligation arising from a "nudum pactum" to make it actionable. The formerly current[2] opinion in the common law that an express promise, founded on an existing moral duty, is a sufficient cause of action in assumpsit, is not unlike this. Gradually the Northern nations followed suit; the French lawyers of the sixteenth century, going back as humanists to the original Roman authorities, held out latest of all. From the seventeenth century onwards, German writers boldly appealed to the law of nature. The modern philosophic lawyers of Germany do not seem wholly satisfied with the results.[3] I am not aware of any evidence that our common lawyers knew or cared what was happening among Continental civilians, or that English canonists, who had already taken their own line, troubled themselves about it. For the purposes of our own history we shall be safe, I think, in confining our attention to English authorities.

There is really no sure standing-ground earlier than Glanvill, and we may begin with Glanvill accordingly. The title of his tenth book is "De debitis laicorum quae debentur ex diversis contractibus, videlicet ex venditione, emptione, donatione, mutuo, commodato, locato, conducto, et de plegiis et vadiis sive mobilibus sive immobilibus, et de cartis debita continentibus." It will be observed that this includes the law of pledge and mortgage, which we now regard as belonging to the law of property rather than of contract. Why Glanvill used the word "laicorum," at first sight pointless to modern eyes, will soon enough appear. The promise of the title is but scantily fulfilled. Nothing is said of grants or gifts, and very little of hiring or the divers forms of loan. In fact, the use of the terms *mutuum*, *commodatum*, *locatum*, *conductum*, is a mere

[1] Seuffert, *op. cit.* 77, 80.

[2] Note to Wennall *v.* Adney, 3 Bos. & P. at p. 249; 6 R. R. at p. 782.

[3] Seuffert, *op. cit. ad fin.*

flourish to show the clerical reader that the king's lawyers could speak his own language with him if they chose. What we really gather from Glanvill's exposition is, positively, a classification of modes of proof; negatively, the assurance that the king's court did not concern itself with ordinary matters of contract. "Privatas conventiones non solet curia domini regis tueri." [1] It admitted, in general, only two kinds of proof, — the defendant's deed, and trial by battle.[2] There is no sign as yet, of any desire to extend the jurisdiction. Four ways of creating an obligation seem to be recognized; not meaning necessarily, nor even usually, an obligation which the king's court will enforce. These are "plegiorum datio," "vadii positio," "fidei interpositio," "cartae expositio." It is needless to say much here about the validity of sealed writing, which in its earlier history, like so much else in archaic jurisprudence, appears rather as matter of evidence than as a substantive part of law. The defendant's deed is a solemn admission; [3] and, according to the general habit of archaic law, when it has once established itself as a mode of proof, it is conclusive, or all but conclusive. Thenceforward it is only a short step to holding as matter of law that a deed has an operative force of its own which intentions, expressed never so plainly, in other ways have not. With regard to sale and pledge we get a certain amount of substantive information. The contract of sale, as presented by Glanvill,[4] is thoroughly Germanic. Scraps of Roman phraseology are brought in, only to be followed by qualification amounting to contradiction. To make a binding sale there must be either delivery of the thing, payment of the whole or part of the price, or giving of earnest. The specially appointed witnesses of the Anglo-Saxon laws provide, of course, not an alternative form or evidence of the contract, but a collateral precaution. In substance, these are the very conditions

[1] x. 18, cf. c. 8: "Curia domini regis huiusmodi privatas conventiones de rebus dandis vel accipiendis in vadium, vel alias huiusmodi, extra curiam sive etiam in aliis curiis quam in curia domini regis factas tueri non solet nec warrantizare."

[2] x. 17.

[3] Cf. Salmond, Essays in Jurisprudence and Legal History (London, 1891), 14, 44 *seqq.*

[4] x. 14. "Perficitur autem emptio et venditio cum effectu ex quo de pretio inter contrahentes convenit, *ita tamen quod* secuta fuerit rei emptae et venditae traditio, *vel quod* pretium fuerit solutum totum sive pars, *vel saltem quod* arrhae inde fuerint datae et receptae." Sir E. Fry's remark, Howe *v.* Smith (1884), 27 Ch. Div. 89, 102, on the supposed Roman derivation of the old law as to earnest-money, as stated substantially to the same effect by Bracton, cannot be supported in face of the manifestly non-Roman character of the other rules.

which the Statute of Frauds allows as alternatives to a note or memorandum in writing in the case of a sale of goods within the seventeenth section. Observe that the giving of earnest is treated as quite a different thing from part payment. Earnest, as the modern German writers have shown, is not a partial or symbolic payment of the price, but a distinct payment for the seller's forbearance to sell and deliver the thing to any one else. In the Statute of Frauds, five centuries later, "something in earnest to bind the bargain" and "part payment" are distinguished, indeed, but thrown into the same clause as if the distinction had ceased to be strongly felt. In Glanvill's time earnest was still, as it was by early Germanic law everywhere, less binding than delivery or part payment, for if the buyer did not choose to complete, he only lost the earnest he had given. The seller had no right to withdraw from the bargain, but Glanvill leaves it uncertain what penalty or compensation he was liable to pay. In the thirteenth century[1] Bracton and Fleta state the rule, probably a very old one, that the defaulting buyer must repay double the earnest; in Fleta the law merchant is said to be much more stringent, in fact prohibitory, the forfeit being five shillings for every farthing of earnest. There was no machinery, it will be remembered, for assessing damages; and this also explains why the only remedy on what we now call an express warranty of soundness[2] was to return the object (assumed throughout to be a horse or head of cattle), and sue in debt for the price if it had been paid. In case a third party claimed the object as stolen from him, the seller must be prepared either to warrant the buyer's right, or, if he refuses to do this, to be himself impleaded by the buyer, with the possible end of a trial by battle.[3] There was certainly no question of property passing before actual delivery. Such a question would indeed not have been intelligible at a time when property was in no way distinguished from the right to possession. We are told that the thing was at the risk of the party in possession.[4] Bracton and Fleta repeat this, and seem not to allow that the contract was complete without delivery, even when the whole price was paid.[5]

[1] Bracton, fo. 61 *b*, 62 *a*; Fleta, l. 2, c. 58.

[2] "Si venditor ipse rem suam vendiderit emptori tanquam sanam et sine mahemio."

[3] Glanv. x. 15.

[4] "Periculum autem rei venditae et emptae illum generaliter respicit qui eam tenet, nisi aliter convenerit."

[5] In Madox, Form. Ang. 167, we have a sale of 40*l.* worth of growing crops with receipt in the body of the deed for "unum denarium ratione Ernesti super vendicioi

Glanvill's chapters on pledge and mortgage[1] give us to understand that the king's court did not accept cognizance of such matters, except so far as the contract might lead to a direct claim to recover possession of the goods or land put in pledge, or to hold the pledge free from the debtor's claim to redeem. Both ecclesiastical and secular authority regarded usury as unlawful, if not punishable, and as involving the true mortgage, *mortuum vadium*, in its condemnation.[2] Accordingly, interest was pretty high, and the censure of the law was evaded by conveyancing devices not unworthy of a more refined age.[3] Pledge, with surety, represents the earliest known Germanic form of obligation.[4] It seems that the duty of paying wergild was that which first led to a legal process of giving credit. Where the sum due was greater (as must have often happened) than the party buying off the feud could raise forthwith, or at any rate produce in a convenient form, he was allowed to pay by instalments on giving security, originally in the form of actual hostages. It is of some importance to note that the original surety is a hostage or living pawn, not an auxiliary contracting party. The transaction, in fact, is not at this stage a contract at all, it is only a stay of execution upon terms. But the roots of credit and contract are there. Gradually material security is substituted for the living hostage, and we have the conception of "wed," or "vadium," as an operative legal form for binding a bargain. At last the security is no longer even a substantial pledge; the contract becomes purely symbolic or formal. A stick, or even a hair from the promisor's beard, will serve; and the current etymology of *stipulatio* from *stipula* helps Romanized clerks to a queer amalgamation of the Germanic transaction "per festucam" with the Roman formal contract.[5] A curious connection with the religious obligation by faith-plight, to which we come

praedictam;" the crops not to be removed till the price is paid. This is well into the fourteenth century (15 Ed. II., A. D. 1321). Cf. 17 E. IV. 1, discussed in Blackburn on Sale.

[1] Glanv. x. 6–11.

[2] Aut ita convenit inter creditorem et debitorem quod exitus et redditus interim se acquietent, aut sic quod in nullo se acquietent. Prima conventio iusta est et tenet: secunda iniusta est et inhonesta, quae dicitur mortuum vadium, sed per curiam domini regis non prohibetur fieri, et tamen reputat eam pro specie usurae. — GLANV. x. 8.

[3] See Ancient Charters, Part I., ed. J. H. Round (Pipe Roll Soc., 1888), Nos. 56, 61.

[4] See Heusler, Inst. d. D. P. R. ii. 240–250.

[5] Canciani, 2. 465, "per istum fustem" in the same formula (from a Veronese MS.) with "spondes ita? sic facio;" Grimm, D. R. A. 123, 129, 130; cp. Du Cange, *s. v.* Festuca.

next, is established by the fashion which prevailed for some time, and which leaves traces quite late in the Middle Ages, of regarding the debtor's honor as a kind of object put in pledge with the creditor. One is tempted to guess that this may be at the bottom of the Germanic form of "fidei datio;" but when we consider it in the light of Roman analogy, the obligation of plighted faith would rather seem to go back to the antiquity of days when such subtilties were unknown, and, in fact to be older than any regular temporal sanctions. We know that the right hand was hallowed to Fides from very early times. Although it may seem plausible at first sight to suppose that originally there was not a mere giving of the hand, but a handing over of some material symbol,[1] the mutuality of the hand-grip is against this. It seems more likely that a man proffered his hand in the name of himself and for the purpose of devoting himself to the goddess if he broke faith. Expanded in words, the underlying idea would be of this kind: "As I here deliver myself to you by my right hand, so I deliver myself to the wrath of Fides [or of Jupiter acting by the ministry of Fides, *dius fidius*] if I break faith in this thing."[2]

All we learn officially about *fides* in the twelfth century is that people must have some better proof if they will come to the king's court and not go empty away. "Die autem statuta debitore apparente in Curia, creditor ipse si non habeat inde vadium neque plegios neque alium diracionationem nisi solam fidem, nulla est haec probatio in curia domini regis."[3] Glanvill is careful to add that "fidei lesio vel transgressio" is a proper subject of criminal cognizance in the ecclesiastical court; but by statute (per assisam regni, *i. e.*, the Constitutions of Clarendon) "fidei interpositio" must not be used to oust the king's jurisdiction. To this point we must return; but we may first look for traces of what the practice outside the king's court was. The rule of the Court

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[1] Grimm, D. R. A. 605, seems to suggest this.

[2] For the special connection of Fides with Jupiter, see Ennius ap. Cic. Off. 3, 29, 104: "O Fides alma apta pinnis et iusiurandum Iovis." Cp. Leist, Altarisches Ius Civile, Jena, 1892, pp. 420 *seqq*. Leist has no doubt (p. 449) that the hand itself was the pledge. Promises by oath were said to have been put by Numa under the protection of all the gods, *ib.*, 429. Cicero's comment, "qui ius igitur iurandum violat, is fidem violat," etc., deriving the force of a formal oath from the natural obligation of *fides* implied in it, is a reversal, perhaps a conscious reversal, of the process of archaic morality. Other passages in Cicero show that the cult of Fides was treated as deliberate ethical allegory by educated Romans of his time.

[3] Glanv. x. 12.

Christian, whatever its origin, answered to and was reinforced by customary Germanic law. So much we may take from the Salic law, of which the fiftieth chapter[1] is headed "De fides factas."

In English deeds after the Conquest we find quite commonly, down to the time of Edward I., covenants or confirmatory clauses in which the words "affidare," "fide media," occur.[2] Since we know that *fides* was not available as a method of proof in the king's court, it follows that the practical object of such clauses was to give jurisdiction to the Court Christian, or possibly to other local courts not bound by the strict rules of the king's court. In one royal department, the Exchequer, the solemn faith-plight had an important part. The sheriff gave his faith for the accuracy of his returns as to dues which could not be satisfied, and he was authorized to give time to a tenant in chief of the king who in person, or by his bailiff, pledged his faith to the sheriff to render account on the proper day.[3] Undertakings "interposita fide" were not unfrequent from the eleventh to the thirteenth century in transactions among princes and the great men of the kingdom, where one would rather have expected to find an oath.[4] We have already seen, however, that the canonists, herein following the rationalizing ethics of Cicero,[5] treated the obligation by faith as little, if at all, inferior to that of an oath. It would seem, indeed, to have implicitly contained the essentials of an oath, and to have differed from an oath only in the absence of a sacred book, or other thing sworn upon (except so far as the right hand itself was in early times deemed sacred for this purpose), and of an express imprecating form of words.[6] We need at this stage no further authority or illustration to show that the spiritual courts freely claimed and exercised jurisdiction in all sorts of cases where *laesio*

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[1] As now commonly cited; p. 65 in ed. Behrend, 1874.

[2] Madox, Form. Angl. 147, 151, 154, 160; sometimes there is an oath with express submission to spiritual jurisdiction, 161; with the very full form, 157 (A. D. 1247); cp. F. W. Maitland's example in L. Q. R. vii. 65, of about thirty years later.

[3] Dial. Scacc. ii. 12, 19, 21, 28.

[4] Sir E. Fry in L. Q. R. v. 238.

[5] Ibid.

[6] Sohm says, Eheschl. 48: "Nur eine Abschwächung des Eides ist nach mittetalterlicher Uebung der Handschlag," not meaning, apparently, to assert any deviation of the kind within historical times. The citations in his note rather go to show troth-plight as standing on the same line as oath.

fidei was involved.[1] The king's temporal courts, after living for some centuries in a state of frontier disputes with the Courts Christian, addressed themselves to a serious competition in the fifteenth century, and finally, if the phrase may be excused, drove their rivals out of the trade. For the present it suffices to mark the limits within which the debatable ground was narrowed by the Constitutions of Clarendon, and, a century and a quarter later, by the so-called statute of *Circumspecte agatis*.

One hardly need explain that there was no question of war all along the line between the spiritual and the temporal power. The king never disputed that many questions belonged of right to the justice of the Church, nor the Church that many belonged to the justice of the king. But there was always a greater or less extent of border-land which could be more or less plausibly fought for. In this region the mastery was with the party which could establish the right to draw the boundary line. This was quite as clearly perceived by Henry II. and Becket as by any modern political theorist; and the stress of the controversy was on the point of determining who should have the prerogative voice on the question of jurisdiction in doubtful cases. The Constitutions of Clarendon mark the king's determination that the king's judges, not the bishops, shall be the persons to say what matters are for the king's court and what are not. The fifteenth article, which alone immediately concerns us here, is in these terms: "Placita de debitis quae fide interposita debentur vel absque interpositione fidei sint in iustitia regis."

This does not say that spiritual courts shall not entertain any suit founded on *fidei interpositio*, but only that, where there is a debt of which the king's court has cognizance, the addition of *fidei interpositio* shall not transfer the jurisdiction to the spiritual court. It seems to leave the Court Christian a free hand in cases where the secular procedure does not give any remedy at all. This view was beyond question freely acted upon in practice, and it seems to have been approved by the framers of *Circumspecte agatis*. This document may be described as a royal circular to the judges; perhaps it was issued along with some set of commissions, or sent after the judges after they had already started on their circuits. As Coke states it in his curiously unhistorical way, "The Bishop

[1] See Coote, Practice of Eccl. Courts, Introd. 93 *seqq.*, and Archd. Hale's Precedents and Proceedings, *passim*.

of Norwich is here put but for example; but it extendeth to all the Bishops within his Realm."[1] The bishop's court is not to be interfered with in matters of spiritual discipline, "pro hiis quae mere sunt spiritualia," — namely, mortal sins which are not punishable as crimes by the temporal power; and it is laid down as already settled ("concessum fuit alias") that laying violent hands on a clerk, defamation, and, according to some copies, breach of faith in like manner, are good subjects of ecclesiastical jurisdiction so long as not the payment of money, but spiritual correction, is the object of the suit. The words, "et similiter pro fidei laesione," have always been treated as authentic; and it would be idle for any purpose of legal history to conjecture whether they were an original part of the letter omitted by accident in some copies, or an addition inserted only after a certain number had been written and despatched.

Such records of ecclesiastical practice as exist, and have been made public, show that the Courts Christian were not slow to exercise all the power this ordinance left them, and possibly more.[2] There is nothing to suggest that their judges and officers troubled themselves to inquire in any case whether there might not be a remedy in the secular court, and it is evident that many of the suits brought in the ecclesiastical courts were in substance not distinguishable from actions of debt or detinue. A protest made by Fortescue and some of his fellow-judges in the year 1459 is on record;[3] but, so far as we can learn, it had no great effect at the time.

We may now pass to the secular remedies available for enforcing contracts under the system of the common law as settled in the thirteenth century. The action of debt was more freely used than in Glanvill's time, but it was no more an action on a promise in Edward I.'s reign — nor is it now, for that matter, in those jurisdictions where it still exists — than it was in Henry II.'s. It is a "droitural" proceeding, a writ of right for money or chattels; it claims restitution, not the performance of an undertaking.[4] The

[1] 2 Inst. 487.

[2] See select cases noted at end.

[3] 38 H. VI. 29, pl. 11. A compromise of an ecclesiastical suit for a sum certain, made in the Court Christian with renunciation of *privilegium fori*, was enforceable in the same court. Bracton's Note Book, pl. 570, A. D. 1231.

[4] See the form in the "Statutum Walliae," and cp. F. W. Maitland, Appendix A to Pollock on Torts.

defendant has money or goods of the plaintiff's which he ought to return, and the plaintiff claims to have his money or his goods again in the same words in which he would claim to be restored to possession of land. It is "Praecipe N. quod juste et sine dilatione reddat R.," — "unam hidam terrae," or "centum marcas," as the case may be; and the creditor is said to be "deforced" of his money no less than the claimant of his land. Indeed, this was never forgotten in the modern system of pleading while common-law pleading existed in England; for debt would lie whenever a sum certain was due to the plaintiff, whether by contract in the modern sense or not. Statutory penalties, forfeitures under by-laws, amercements in inferior courts, money adjudged by any court to be due, were recoverable by it.[1] The repayment of an equivalent sum of money is equated, with the bold crudity of archaic legal thought, to the restitution of specific land or goods. Our Germanic ancestors could not conceive credit under any other form. After all, one may doubt whether the majority of fairly well-to-do people, even at this day, realize that what a man calls "my money in the bank" is a mere personal obligation of the banker to him (cp. Langdell, Contracts, §§ 99, 100.

Another remedy known in the thirteenth century, which at first sight looks much more capable of being used for the enforcement of contracts in general, is the action of covenant. We must not forget, however, that the writ of covenant is no less "droitural" in form than that of debt: —

"Breve de convencione.

"Rex vic. salutem. Precipe A. quod juste et sine dilatione teneat B. convencionem inter eos factam de uno mes. X acris terre," etc.[2]

Further, it appears from the Irish Register of 1228, which has been investigated by Mr. F. W. Maitland, that the writ was originally confined to matters "de aliqua terra vel tenemento ad terminum;" and in the Statutum Walliae this seems to be regarded as the usual and typical, if not the only, scope of the action. There is some evidence that in the course of the thirteenth century attempts were made to establish a kind of qualified tenure in villeinage by express agreement, "ex conventione."[3] I know not

[1] Blackst. iii. 160, 161, with an unhistorical attempt at explanation by an "implied original contract" to pay; cp. Langdell, Summary of Contracts, § 100. See Note B at end.

[2] Stat. Wall. 12 Ed. I. c. 6 (A. D. 1284).

[3] Bracton, 208 *b*, 209 *a*.

whether payments described as "conventionary," and not otherwise accounted for, which sometimes occur in old titles, are to be referred to this origin.

At any rate, almost all the recorded cases on covenants of the thirteenth and early fourteenth centuries appear to relate to interests in land,[1] although it is certainly said in the Statutum Walliae, c. 10, "petuntur aliquando mobilia aliquando immobilia." Judgment might be for the recovery of seisin where power of re-entry for breach of covenant was expressly given in a lease, and possibly in other cases. At one time, indeed, it was held that a covenant to assure lands might operate (as we should now say) as a conveyance, even against a subsequent purchaser by feoffment.[2] This last opinion, however, is clearly overruled by the Statutum Walliae, which specifies the case of the defendant having enfeoffed a stranger as an example of those in which the freehold cannot be recovered, and the judgment must be for damages.

Still, there was no formal reason why the action of covenant should not have become an efficient means of suing on contracts of every kind, if the king's courts had admitted the agreement to be proved otherwise than by writing. For some time the practice was at least unsettled in this respect. In Henry III.'s time we find plaintiffs offering to prove alleged covenants by suit, and defendants offering to disprove them by wager of law, without either party having anything to say about the necessity of a deed.[3] In one case, A. D. 1234,[4] we find a defendant in covenant objecting that the plaintiff brings neither deed nor suit; in fact, no proof at all: "Nullam sectam producit nisi simplicem vocem suam nec cartam ostendit nec aliud de aliqua convencione;" the plaintiff of course fails, but evidently it was thought that suit might have been enough. Two generations later, however,[5] we have two cases in the same eyre showing that suit is accepted by the court in a writ of debt, and that in covenant suit without writing is objected to; the result is not stated, but it would seem from another report of proceedings in

[1] Cp. Reeves, Hist. Eng. Law, ii. 336. The case from 20 & 21 Ed. I., cited below, is a not quite certain exception.

[2] Bracton's Note Book, pl. 36. In 22 Ed. I. 494–6 there seems to be some doubt whether the freehold can be recovered or not. Note the use of the word *atort*, which is not immaterial in connection with the later history of assumpsit, and cp. 30 Ed. I. 142.

[3] Bracton's Note Book, pl. 890, 1549.

[4] Ibid. 1129.

[5] Y. B. 20 & 21 Ed. I. 222 (A. D. 1292). *Qu.* was this "bill of covenant" by a writ of covenant proper?

the same case[1] that the plaintiff sued afresh in debt. Not long after this time, at all events, the rule finally prevailed that nothing less than a deed would be accepted as proof in the action of covenant; insomuch that *covenant* became, as it still is, the regular term for a promise under seal. How completely specialized and incapable of expansion the writ of covenant was in the settled practice of the common law is shown by the familiar rule that when the promise, though under seal, is to pay a sum certain, debt, not covenant, is the appropriate remedy.[2] Bracton certainly thought that miscellaneous covenants, even under seal, were not within the ordinary jurisdiction of the king's court: "Iudicialis autem esse poterit stipulatio vel conventionalis [Bracton explains on the same page, following the general tendency of mediæval Roman law, that "stipulatio" may well be made "per scripturam"] . . . conventionalis quæ ex conventione utriusque partis concipitur . . . et quarum totidem sunt genera quot paene[3] rerum contrahendarum, de quibus omnibus omnino curia regis se non intromittit nisi aliquando de gratia."[4] The fact that Bracton's exposition of contracts in this chapter is copied from the Institutes of Justinian shows of itself that the common law had as yet no theory of contract at all, nor, in the superior courts at any rate, a systematic practice.[5]

There is still the action of Account to be considered. In this action also the writ contained the characteristic "droitural" words *juste et sine dilatione*.[6] The form was "Precipe A. quod iuste et sine dilatione reddat B. rationabile compotum suum de tempore quo fuit ballivus suus in C. receptorum denariorum ipsius B. ut dicit."[7] And in the modern theory of the law, "the obligation to render an account is not founded upon contract, but is created by law independently of contract."[7] It was a means of enforcing certain kinds of contracts and obligations *quasi ex contractu;* but it leaves us as far off from any general doctrine of contract as ever.

The earliest example of this action known to me dates from

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[1] Ib. App. II. p. 487.

[2] Debt was already allowed as an alternative form of action in the thirteenth century. Y. B. 21 & 22 Ed. I. 559, 601.

[3] *Poenae* in the printed book; *pene* in several good MSS. The phrase is from I. 3, 18, § 3.

[4] Bracton, fo. 100 *a*.

[5] Güterbock has rightly drawn this inference (Henricus de Bracton, p. 106).

[6] O. N. B. 57; cp. F. N. B. 117 *c*.

[7] Langdell, Survey of Equity Jurisdiction; Harvard Law Review ii. 243.

1232;[1] but much of the later efficacy of the process was due to the statute of Marlbridge (A. D. 1267),[2] and we do not find the action in common use before the fourteenth century. Throughout the fourteenth and fifteenth centuries it was frequent enough, as the Year Books and Abridgments show. In after times the more powerful and convenient jurisdiction in equity superseded the process of account at common law, though the action lingered on in one application, as a remedy between tenants in common, late enough to furnish one or two modern examples.

In inferior and customary courts of secular justice the rules of proof were doubtless much laxer than in the king's courts, and informal agreements must have been enforced in their various jurisdictions to a considerable extent. Mr. Maitland has called attention to strong evidence of such practice in the rolls of the Bishop of Ely's court at Littleport, belonging to the late thirteenth and early fourteenth century. There we find a number of suits on miscellaneous *conventiones* which are neither stated, nor can easily be supposed, to have been in writing.[3] Even in the regular law-books we hear of customs in London and elsewhere to allow covenants to be proved by word of mouth, or, at any rate, to admit proof by tally where the king's court would require a deed. Attempts were made to obtain a footing for these customs in the king's courts, but they seem to have uniformly failed.[4] We still know very little of the procedure and rules of proof of the courts which administered the law merchant; and what the books describe as special customs may perhaps have been nothing but the application of general or at least English mercantile usage. There is nothing to show that such customs, general or special, had any effective influence on the development of the common law. Formalism prevailed in the superior courts, and in the fifteenth century the strongest and most acute-minded judges who had administered the king's justice since Edward I.'s time found themselves without any adequate means, in the way of either doctrine or practice, of keeping abreast of the needs of business and facing the competition of the ecclesiastical courts.

I have nothing to say, in this REVIEW at any rate, of the bold and subtle devices by which the seemingly insuperable obstacles

[1] Bracton's Note Book, pl. 859.

[2] 52 Hen. III. c. 23.

[3] The Court Baron, Selden Soc., 1891, pp. 114–118.

[4] F. N. B. 146 *a*; Liber Albus, 191 *a*. Other references in Pollock on Contract, 5th ed. 141.

were ultimately circumvented. Mr. Ames has made the history of Assumpsit his own.

Frederick Pollock.

NOTE A. — It would appear that in practice the ecclesiastical courts continued to exercise a wider jurisdiction over affairs of common temporal life, including the fulfilment of promises, than could be justified even by a liberal construction of the statute *Circumspecte agatis;*[1] and this down to the beginning of the sixteenth century, as Hale's collection of cases makes plain.

In 1482, "Willielmus Parson fregit fidem Willielmo Wheteaker pro convencione feni, 'bargen of hey,' iij s. ij d."[2] Parson denies the article, and is dismissed, but is in trouble again for not paying the fees.

"Willielmus Weldon fregit fidem Mag° Ric° Bosworthe pro non solucione XXs."[3] He submits.

In 1508, "Robertus Church notatur officio fama referente quod est communis perjurus et presertim violavit fidem cuidam Johanni Tatam in non solvendo eidem Vs. quos promisit sibi fide media ad terminum effluxum pro toga de dicto Johanne empta."

Proceedings are abated by the party's death: "Deus Rex celestis miserere anime sue quia mortuus est ideo dimittitur."

In 1500, "Thomas Hall notatur officio quod est communis violator fidei."[4]

In one case of 1490, a claim of 14*s.* 6*d.* for money lent "nomine mutui" (but it seems really for the price of goods supplied) is made by Thomas Palmer and Alice, his wife, attended by witnesses, who swear to the debtor's acknowledgment.[5]

Proceedings for a vexatious prosecution for alleged breach of faith.[6]

Charge for perjury in non-payment of (sum left blank).[7] This would be within *Circumspecte agatis*, according to the current reading of the text.

Also there are suits for detaining goods, and undertakings given before the court.[7]

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[1] See twelfth to thirteenth century cases from Plac. Abbrev. ap. Coote, Practice of Eccl. Courts, Introd. p. 95.

[2] Hale, Precedents and Proceedings, pp. 7–8, No. xxx.

[3] p. 8, No. xxxi.; p. 80, No. cclxxii.

[4] No. ccxxxviij.

[5] p. 23, No. xcv.

[6] 28, No. cxiii.

[7] 57, No. cc.

iiij die Octobris anno Domino mill° cccc lxxxx Willielmus Wright promisit fide sua media in manu mei Johannis Bellaw quod satisfaceret Ricardo Smyth pistori certa vasa electri, etc.[1]

One Matthew Chambir is also brought to promise as surety.

In 1500, "Isabella Wheler notatur officio quod detinet certa bona Alicie Horewode, viz. ij ollas ejus"[2] (no mention of *fides*).

(The editor seems to think this is a case of not restoring a pledge. Cf. Nos. 49 and 114; but there is nothing to show it.)

NOTE B. — I have purposely not attempted to discuss the element of personal relation between the parties involved in the action of Debt, beyond showing that it was not the obligation of a promise as we nowadays conceive it. Perhaps the notion of Privity in archaic procedure may be simpler than it looks. A man can be put out of possession either with or against his will. If against his will, it is a question of a public offence, — of theft, in fact. Where A finds B, a mere stranger, holding A's cattle, or what not, he challenges the goods as stolen, and puts B to vouch his warrantor. But where A has willingly parted with something that he is to get back in due time (which includes, in the early legal mind, foregoing immediate payment of the price of goods sold, or the like), then a different procedure is required. B has acknowledged A's title, and has to show that he has satisfied the conditions. This distinction does not apply (in and after the Anglo-Norman period at least) to actions to recover land, where it would seem that the notoriety of seisin of immovables takes the place of privity. Land cannot be carried, or driven away, or hidden.

The notion of a "Vindication" in the Roman sense, *i. e.*, a claim to a specific thing founded on the plaintiff's purely civil right of ownership in an abstract form ("hunc hominem meum esse aio ex iure Quiritium"), and independent of any relation, rightful or wrongful, between the parties, was, I conceive, absolutely foreign to our Germanic ancestors. They would have refused to see any ground of jurisdiction.

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[1] 20, No. lxxxvi.

[2] 71, No. ccxlii.